

Both issues raised by the respondent subjects a preliminary hearing Order to Appeals Board review. See K.S.A. 1997 Supp. 44-534a.

(1) The Administrative Law Judge found claimant suffered a work-related injury on February 23, 1998. He ordered respondent to pay temporary total disability benefits and to provide past and future medical treatment for claimant's injury. Respondent contends claimant failed to prove that his low-back injury occurred while working for the respondent.

The Appeals Board concludes the Administrative Law Judge's finding, that claimant's low-back injury occurred at work, should be affirmed. The Appeals Board finds this conclusion is supported by claimant's testimony and the medical records admitted into evidence at the preliminary hearing.

Claimant testified he originally injured his low back when he fell on or about August 29, 1997, while loading freight into a tractor-trailer. Claimant sought medical treatment on his own on September 3, 1997, through his family physician Stan A. Messner, M.D. Dr. Messner prescribed ultrasound treatments, pain medication, took claimant off work for a few days, and then returned claimant to work with a 5 pound lifting restriction. Following the conservative treatment, the doctor then released claimant to return to regular work on September 15, 1997.

Thereafter, claimant testified he was able to work with some stiffness in his low back until on or about February 16, 1998, when he felt a pop in his back as he jumped from a box of freight some three or four feet from the floor of a tractor-trailer. At that time, claimant testified he felt symptoms in his back but was able to continue to work until February 23, 1998, when he suffered so much pain he could hardly walk.

Claimant returned to Dr. Messner on February 24, 1998. Dr. Messner scheduled claimant for an MRI examination and referred claimant to orthopedic surgeon William Shapiro, M.D. The MRI examination showed mild left para central disc protrusion at L5-S1 with perhaps early nerve root encroachment. On the date of preliminary hearing, April 16, 1998, Dr. Shapiro had referred claimant for an epidural injection. Claimant testified he had received some pain relief from the injection. Claimant remained off work as respondent had not offered him accommodated employment within the ten pound lifting restriction imposed by Dr. Messner.

The Appeals Board concludes the preliminary hearing record establishes that claimant was initially injured at work on or about August 29, 1997. He then returned to regular work on September 15, 1997, and was able to work with some symptoms until February 23, 1998. The Appeals Board finds claimant's work activities between September 15, 1997, and February 23, 1998, aggravated his initial low-back injury to the point he could no longer tolerate the pain and discomfort and had to leave work again on February 23, 1997.

(2) The Appeals Board finds the notice issue is somewhat clouded by the discrepancy in the testimony between claimant and respondent's representatives, supervisor Dwayne Dugan; human relations director, Tommy Levering; and dispatcher David G. Taylor. All of

these witnesses testified in person at the preliminary hearing before the Administrative Law Judge. The Appeals Board finds, through the testimony of Ms. Levering and the memorandum prepared by her dated February 25, 1998, the respondent had notice that claimant was claiming he was injured at work through a telephone call from claimant's wife. Claimant also testified his supervisor was working with him on or about February 16, 1998, when he fell from the box of freight onto the tractor-trailer floor. Additionally, claimant testified his supervisor, Mr. Dugan, had him fill out a short-term disability claim and this claim was denied because claimant had indicated on the claim his injury was work related.

The Administrative Law Judge did not make a specific finding that claimant gave notice of accident within 10 days as required by K.S.A. 44-520. However, he did grant claimant's preliminary hearing request for benefits and, therefore, by implication made such a finding. The Appeals Board finds the notice finding had to be based on claimant being a credible witness. Because the Administrative Law Judge had the opportunity to observe all the witnesses testify in this matter, the Appeals Board finds some deference should be given to the Administrative Law Judge's conclusions. The Appeals Board finds, giving some deference to the Administrative Law Judge, claimant gave respondent notice of accident within 10 days of his last day worked, February 23, 1998, which is the appropriate date for claimant's work-related accident.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge John D. Clark's April 16, 1998, preliminary hearing Order should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of June 1998.

BOARD MEMBER

c: Joseph Seiwert, Wichita, KS
Vincent A. Burnett, Wichita, KS
Eric T. Lanham, Kansas City, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director